In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 20.

FRED STEARNS, as County Auditor of Aitken County, Minnesota,
Plaintiff-in-error,

AGAINST

STATE OF MINNESOTA on relation of James N. Marr,
Defendant-in-error.

Additional Brief for Plaintiff-in-error on Reargument.

I respectfully refer the Court to the brief filed on behalf of the St. Paul and Duluth Railroad Company at the last Term of this Court, and to the supplemental brief on behalf of the same Company, which we desire to consider as filed as briefs upon the reargument.

I submit the following additional points:

I.

We understand that it is substantially conceded on the part of the State that even prior to the Constitutional Amendment of 1871 it was within the power of

the Legislature from year to year to impose a tax upon the gross earnings of Railroad Corporations instead of taxing the specific property used by the Railroad for railroad purposes, and that such a method of taxation was constitutional.

In other words, the mere fact that railroads were taxed upon their gross earnings while other corporations or individuals were taxed upon their specific property was not in violation of the constitutional requirements of uniformity and equality in taxation. The contention is, not that such a method of taxation is *per se* invalid, but that the Legislature could not fix a rate for the future so as to bind future Legislatures, nor could it apply this method of taxation to the lands granted in aid of construction, but only to the railroad property actually used for operating purposes.

Even if not conceded, we take it to be established beyond room for serious controversy that the taxation of railroad property by a tax on gross earnings instead of by a valuation of, and by a specific tax upon, its real property and chattels, is not a violation of the uniformity and equality clauses of the Constitution of Minnesota.

The decision of this Court in *McHenry vs. Alford*, 168 U. S., 651, expressly *held* that a tax on gross earnings in lieu of all other taxes was not in conflict with the provision of the organic law of Dakota Territory, providing that there shall be *no* "*discrimination*" in taxing "different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." We, therefore, assume this proposition to be settled law in this Court.

Starting, then, with the proposition that a gross-earnings tax is not *per se* unconstitutional, we proceed to the next proposition, which is likewise established by authority, that lands granted in aid of construction are so far an integral part of the railroad system as to be properly included in the system for purposes of taxation, instead of being taxed separately. If anything can

be considered settled by adjudication in the Supreme Court of Minnesota as well as in this Court, it is that the acts on which we rely do not provide for an exemption, but provide for a commutation. This Court so held in the *Alford* case. Lands granted in aid of construction stand on the same footing as stations, terminals or rolling stock. They are held for railroad purposes only, and not as otherwise productive. The acts in question provide that as soon as the lands are leased or sold they become taxable as lands. Until leased or sold they are taxable as part of an indivisible entity.

See the Minnesota cases cited in our main brief.

II.

Having reached this stage in the discussion, we proceed to inquire whether a distinction may be drawn between an act imposing a gross-earnings tax in a given year and an act fixing a percentage of gross earnings in lieu of all other taxes for all time.

It is suggested that what may be a proper tax for the current year and may not involve any violation of uniformity may become such violation by change in circumstances from year to year. We submit that this distinction is without substance. The fixing of an arbitrary percentage of gross earnings is just as much an infraction of the uniformity clause of the Constitution, if it be an infraction at all, whether fixed for one year, or for ten years, or for twenty years, or forever. Let us look the matter squarely in the face: Is is not as much an infraction of the constitutional requirement of uniformity to say that A, B and C shall pay a tax for the current year of three per cent. on their gross earnings, while D, E and F shall pay the ordinary tax upon their lands and chattels, as it would

be to say that A, B and C shall continue to pay a tax on their gross earnings for a period of years? In other words, is there any logical or rational distinction between the power to discriminate in this manner for one year and the power to discriminate for a longer period or perpetually? The real difficulty lies in justifying this mode of taxation at all. When it is once conceded, as it must be, that, in spite of its apparent lack of uniformity, it is a legitimate exercise of the taxing power of the State, then it is, we submit, equally legitimate without regard to the period to which it is applied. It is to be borne in mind that the tax is not a stationary or arbitrary sum fixed for all time. It is a fixed proportion of the gross earnings; but the gross earnings are changing from time to time, and in the natural course of events are increasing from year to year, and as they increase, so will the tax increase automatically. Furthermore, it is not a tax on net earnings, the amount of which might be made greater or smaller by the management of the company, but it is a tax on the gross earnings which practically regulate themselves by the growth of the country through which the railroad runs and which naturally increase in the absence of gross mismanagement or undue competition.

To sum up our argument on this branch of the case, it is this: when it is conceded that a tax for a given year of a definite percentage of gross earnings, in lieu of all other taxes, is not a violation of the constitutional provisions for uniformity and is not an unlawful exemption of property from taxation, then it must be conceded that such a tax is lawful, if imposed year by year at the same rate of three per cent. and without readjustment from time to time to harmonize with the general scheme of taxation. If, therefore, the Legislatnre can do this year by year, there is no reason why the Legislature cannot do it in advance for a period of years: and if it has the constitutional right to fix the rate of taxation

for a period of years, then it has a right to make a contract with regard to the subject matter in which the rate shall be fixed.

The argument that what may be a fair rate of taxation to-day, as compared with other taxation throughout the State, may cease to be fair ten years from now, is, we submit, fallacious, since this scheme of taxation is not based upon the theory of equalizing the taxation of railroad companies with the taxation of other corporations or individuals throughout the State.

It cannot be seriously claimed that, when the Legislature of the State of Minnesota imposes or sanctions a tax of three per cent. on the gross earnings of a railroad company, it takes into consideration the taxes paid by other corporations or individuals in the community, and computes the three per cent. so as to impose an equality of burdens. Whether the three per cent. tax on gross earnings, imposed upon railroads, is a greater or less burden than that imposed upon individuals upon their real and personal property, or that imposed upon other corporations in the State of Minnesota, cannot be told without a careful examination and a complicated computation. Railroads may be paying more, or they may be paying less, upon the market value of their property, than individuals throughout the State or other corporations.

If, therefore, the Legislature had the constitutional right to impose this arbitrary rate of three per cent. upon gross earnings in the year 1865 without considering the question of its relative burden, as compared with other taxes, then it had the same right in 1866 and 1867, and so on, to the end of the chapter.

III.

When we have once advanced to this point in our argument, then there is no logical halting place till we reach the proposition that a perpetual rate can be fixed by contract, and that such a contract will be enforced by this Court.

This subject has been so often examined and re-examined by this Court that it would seem to be quite unnecessary to call the attention of the Court to any of the cases, were it not that the principles established by the decisions seem to be called in question in this case by our adversaries. They at least dispute the logical consequences flowing from those decisions.

It may not, therefore, be out of place for us to briefly recapitulate what we understand to be the result of the decisions in this Court. We understand it to have been uniformly held that, in the absence of constitutional restriction, the power of the Legislature of a State on the subject of taxation is practically absolute. We understand it also to have been uniformly held that the right of a State Legislature to bind the State by contract on the subject of taxation is coextensive with its power to legislate on the subject. Thus, if the Legislature has the right, as it undoubtedly has in the absence of constitutional prohibition, to make exemptions from taxation, or to select the class of persons or the kinds of property which shall bear the burden of taxation, then the Legislature has the right to contract with a corporation on a valid consideration for exemption from taxation, or for a particular method and rate of taxation. So, if a State Legislature has the right under its constitution, as the Legislature of Minnesota has been uniformly held to have, to commute the taxes of a railroad by imposing a tax upon gross earnings instead of a direct tax upon its property, then it may contract with the Railroad Company for that particular mode of taxation, and if it may so con-

tract for a year it may so contract in perpetuity and may fix the rate in perpetuity. We also understand it to have been held uniformly by this Court that while the presumption is against the making of a contract divesting subsequent Legislatures of the power to impose a tax upon a particular corporation or to change the rate of taxation of a particular corporation, yet, where the contract binds the Company perpetually, it will be held likewise to bind the State perpetually.

Without going back to the earlier cases in this Court, where these principles were first announced in spite of vigorous and earnest opposition from learned counsel, it is sufficient to call the attention of the Court to some of the later cases where the subject has been fully re-examined and the time-honored doctrines of this Court clearly reaffirmed.

The case of *New Jersey vs. Yard*, 95 U. S., 104, is a direct authority for the proposition that, where a tax of a fixed percentage was imposed upon a Railroad Company, and it was declared in the Act that such tax "shall be in lieu and satisfaction of all other taxation or impositions whatsoever by or under authority of this State, or any law thereof," and where the Act had been accepted by the Railroad Company (as were the Acts involved in the case at bar), and where the Company had proceeded to build a portion of its road and to operate the same on the faith thereof, there was a contract binding upon both parties, and as the Railroad Company was bound to pay the percentage continuously, so, on the other hand, the State was bound to accept the percentage in lieu and satisfaction of all other taxation continuously, and that there was no right on the part of the State to revoke the contract. The opinion in the case just cited was delivered by Mr. Justice MILLER.

In the case of *Farrington vs. Tennessee*, 95 U. S., 679, this whole subject was very fully re-examined by Mr. Justice SWAYNE, notwithstanding that he says, in his opinion at page 681, "the ground of the discussion

has been well trodden by our predecessors. Little is left for us but to apply the work of their minds." The case arose under a Charter of a Bank which provided that the Bank should pay to the State an annual tax of one-half of one per cent. on each share of stock "which shall be in lieu of all other taxes." The Court held that this was a perpetual contract, binding on both parties, although there were no words in the contract expressly making it perpetual. The Court reviews the cases theretofore decided on the subject of contracts by the Sovereign and holds in the case before the Court that there was a binding and valid contract.

In the case of *Pearsall vs. Great Northern Railway Company*, 161 U. S., 646, Mr. Justice BROWN again elaborately reviews the authorities on this general subject and says at page 662:

> "This Court has had perhaps more frequent
> "occasion to assert the inviolability of corporate
> "charters in cases respecting the power of taxa-
> "tion than in any other, and in a long series of
> "decisions has held that a clause imposing cer-
> "tain taxes in lieu of all other taxes, or of all
> "taxation to which the Company or stockholders
> "thereof would be subject, is impaired by legis-
> "lature raising the rate of taxation or imposing
> "taxes other than those specified in the Charter."

The foregoing citations are selected merely by way of example from the innumerable cases in this Court upon the subject.

IV.

The entire body of existing railroad legislation in the State of Minnesota must be taken into consideration as a whole in passing upon the question of the uniformity of this system of railroad taxation.

We understand the fact to be that, taking into view the various statutes passed from time to time by the Legislature of the Territory and of the State of Minnesota, the rate of taxation will be found to be substantially uniform as to all railroads. With a very few and trifling exceptions, we understand that all the railroad corporations in the State of Minnesota are taxed at the rate of three per cent. on their earnings. There are some who are still paying a lower rate on the one and two per cent. basis, not yet having reached the stage when the three per cent. rate applies; but practically all the railroads in the State are taxable on the three per cent. basis when they have passed or shall hereafter pass beyond the earlier years of their existence. We have thus a practical uniformity, which is in effect the same as if there were a general law embracing all railroads in one Act and providing for this mode of taxation and for this particular rate.

V.

The decisions in the various States, having similar provisions to those of the Minnesota Constitution, clearly establish the right of the Legislature to treat a railroad system as an indivisible entity for purposes of taxation and to apply to a railroad system a different mode of valuation and a different method of taxation from that applied to other corporations or to individuals.

The Constitutton of 1870 of the State of Tennessee is very much stricter than the Constitution of Minnesota in its requirements as to taxation. Art. II., Section 28, provides : " *All property*, real, personal, or mixed, *shall be taxed*." Certain exceptions are then provided for, which do not include railroad property. " All property shall be taxed *according to its value*, that value to be ascertained in such manner as the legislature shall direct, so that *taxes shall be equal and uniform* throughout the state. *No one species of property* from which a tax may be collected *shall be taxed higher than any other species of property* of the same value."

Under these stringent provisions, it was held by the Courts of Tennessee and their ruling was affirmed by this Court in the *Gaines* case (97 U. S., 697), that the taxation of a railroad company by imposing a tax of a percentage of gross earnings was a violation of the constitutional mandate, because it " did not impose a tax upon the property of railroad companies equal and uniform with that imposed upon the property of individuals."

This construction of the Tennessee Constitution differs radically from the decisions of the Supreme Court of Minnesota construing the Minnesota Constitution and the decision of this Court in the *Alford* case construing the Organic Act of Dakota.

Yet even in Tennessee, under these stringent provisions of the Constitution of 1870, thus narrowly construed by the Courts of Tennessee, it has been *held* that a County assessment of a railroad for taxation by estimating the value of the whole road in the State and out of it, including rolling stock, equipments and buildings, and then taking the average value per mile, and multiplying by the number of miles in the County, is not unconstitutional, and that a railroad is to be estimated according to its value as a railway.

Louisville & Nashville R. R,, Co. vs. The State of Tennessee, 8 Heiskell, 664.

The Court say at page 797: "A railroad, with its necessary fixtures and appliances, is real estate, and taxable as such, and must be taxed upon its value as a railroad, and *that value must be ascertained by its* actual, and not its speculative, *profits*, or its mere capacity for productiveness, as it must be taxed at its value when assessed, and not what might be its value if under better management."

And again, at page 803: "In this case the plaintiff's property has been assessed on its actual value, as railroad property, upon a valuation of its entire roadbed, rolling stock, equipments, engine houses, machine shops, depot grounds and lands, in view of the special uses and purposes to which they were all put and applied and the *profits arising from them as a railroad and appurtenances.*"

The Court held the assessment to be "lawful and proper."

This case was decided in 1875, and involved the validity of the assessment of 1874.

The language of Section 3 of Article IX. of the Minnesota Constitution is copied from that of Section 2 of Article XII. of the Constitution of Ohio (adopted in 1851), which reads: "Laws shall be passed taxing *by a uniform rule*, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise and also all real and personal property, according to its true value in money."

The words "by a uniform rule" are omitted in the Minnesota Constitution. The other language above quoted appears in the section of the Minnesota Constitution above referred to.

Notwithstanding this provision for taxing real and personal property "according to its true value in money" and for taxing by a "uniform rule," the Courts of Ohio have held that "the property of a corporation may be regarded, in the aggregate, as a unit, an entirety, as a plant designed for a specific object;

and its value may be estimated not in parts, but taken as a whole."

State vs Jones, 51 Ohio St., 492, 511.

Accordingly, the constitutionality of the so-called "Nichols Law" was upheld, which taxed express companies under a valuation to be made by a State board and apportioned among the several counties of the State, not in proportion to the property of the companies in the several counties, but "in the proportion that the *gross receipts* of the business of said express companies in the places where they transact business, bear to the *entire gross receipts in this State* of said express companies."

The Court say (at p. 505): "Taxation by a uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property, without regard to any classification."

The Court cites (at p. 507), with approval, *Wagoner vs. Loomis*, 37 Ohio St., 571, in which case "it was urged in argument that because a method of return, and mode of valuation, and agency for determining valuation, separate and distinct from that as to individuals, was fixed in reference to banks, the law violated Section 2 of Article XII. of the Constitution. But it was held in that case that statutory provisions whereby different classes of property are listed and valued for taxation in and by *different modes and agencies* are not necessarily in conflict with the provisions of the Constitution which require all property to be taxed by a uniform rule, and according to its true value in money."

The system of railroad taxation in force in Ohio was also approved by the Court in this case of *State vs. Jones.*

See, also, *R. R. Co. vs. Commissioners*, 48 Ohio St., 249, where it is said by the Court at page 251: "The method of taxing railroad companies prescribed by

Section 2774, Revised Statutes, has been in use in this State for more than a quarter of a century, and its validity has not been seriously challenged before."

This section provides that the value of the property of any railroad company, as found and determined by a board (composed of the county auditors of the various counties through which the railroad runs), " shall be apportioned by said board among the several counties through which such road, or any part thereof, runs, * * * in the same proportion that the length of such road in such county bears to the entire length thereof in all such counties." In other words, as summarized by the Court in *R. R. Co. vs. Commissioners*, 48 Ohio St., 251:

> " The section provides that such proportion of the entire property of a railroad (except realty, not necessary to its daily operations) shall be taxed in each district through which it runs, as the length of road in such district bears to its whole length."

The same principle of apportionment, as applied to telegraph and telephone companies by the " Nichols Law," is approved in *State vs. Jones*, 51 Ohio St., 508.

The ruling in the case of *State vs. Jones* was affirmed in this Court so far as questions arising under the Federal Constitution gave this Court jurisdiction in *Adams Express Co. vs Ohio*, 165 U. S., 194; 166 U. S., 185.

VI.

In determining the true meaning and intent of the Constitution of Minnesota, and in determining the true meaning and intent of the statutes passed by the Legislature of Minnesota, and in determining the force

and effect of the contracts which the State undertook to make with the Railroad Companies, the Court must take into consideration the situation of affairs in the State at the time when the Constitution was adopted and at the times when these contracts were entered into, and must determine these questions by the situation as it then existed and not by the situation as it now exists.

As was said very forcibly by this Court in the case of *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S., 502 :

> " In *Preston vs. Browder*, 1 Wheat., 115, 120, it was said that in the construction of the statutory laws of a State it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of many of the provisions in them. The same general rule is stated in *United States vs. Union Pacific Railroad*, 91 U. S., 72, 80, 81, and in *Platt v. Union Pacific Railroad*, 99 U. S., 48, 64, where it was applied in construing certain sections of the act of Congress, approved July 1, 1862, incorporating and granting lands to the Union Pacific Railroad Company. So in *Winona & St. Peter Railroad v. Barney*, 113 U. S., 618.
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> " Legislative contracts, especially, should be read in the light of the public policy entertained and the purposes sought to be accomplished *at the time they were made*, rather than at a later period when different ideas and theories may prevail. In *Platt v. Union Pacific Railroad* Mr. Justice STRONG expresses this proposition as follows : ' There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * * But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves

in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.' "

The situation of the people of the State of Minnesota at the time when their Constitution was adopted and the policy of the State, which led to the passage of the statutes in question in this case, appear clearly from the language of the Supreme Court of Minnesota used in the *Parcher* case and in the *Luther* case, quotations from which are made in the briefs of our associate and ourselves heretofore filed with this Court. At the time of the adoption of the Constitution the State was absolutely without a mile of railroad. Its only highway for commerce by steam, or otherwise than by horse power, was the Mississippi River, which was navigable only to St. Paul and was not navigable at all for a large portion of the year on account of the severe northern winter which set in early and lasted late and which made the river impracticable for navigation. There was no access whatever to Lake Superior from St. Paul except by stage, or wagon, or on horseback, through a wilderness. There was but a fringe of civilization in the State and a vast uninhabited and undeveloped territory waiting to be reclaimed from the wild beasts and the savages. Under these circumstances the last thing that entered into the minds of the men who framed the Constitution of Minnesota was to so tie the hands of their Legislature as to prevent them from granting inducements to Railroad enterprises which might open up and develop the great resources of the State. On the contrary, their desire was to leave the path open to the future legislatures of the State to hold out all proper inducements to investors willing to take the risk of laying out new railroads through the wilderness, waiting for their dividends until they should have developed the territory through which their railroads were to

run, and to which they were to bring the inhabitants from whom, and from whom alone, their future profits were to come.

The framers of the Constitution knew, of course, of the system of land grants that was then in existence under Acts of Congress and Acts of the Territorial Legislature ; they knew, of course, of the numerous statutes that had been passed by the Legislature of the Territory providing for a tax on gross earnings in lieu of all other taxes. Had they intended that such legislation should cease in the future and that the Legislature of the new State should be shorn of the powers which had been exercised by the Legislature of the Territory in these respects, they would have made the matter too clear for discussion. So far from doing this, they left the matter, to say the least, open to debate, and no one seems to have suspected at the time that any restriction was intended to be put upon the State Legislature in the matter of commuted taxation for railroads in the State. The Legislature, as we have already pointed out, repeatedly went on making new grants of land and enacting new provisions for commuted taxation.

To now apply to the construction of the Constitution a different policy called for by a different situation now that the land grants have become valuable by reason of the building of the Railroads, and when the State is no longer clamoring for the building of railroads, but is seeking to charge the railroads with new burdens, would, we submit, be not only an act of injustice, but would be a violation of all true principles of construction applicable to written instruments, whether constitutions, statutes or contracts. All such instruments are to be construed as the parties themselves would have construed them at the time when they were written.

An act passed by the first legislature after the adoption of the Constitution is a contemporary interpretation of the latter entitled to much weight.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

A contemporary construction of the Constitution acquiesced in and practiced for a period of years fixes the construction, and the court will not shake or control it.

Stuart vs. Laird, 1 Cranch., 299.
Britton vs. Ferry, 14 Mich., 66.

The practical construction given by the legislature to a constitutional provision, for many years acquiesced in and acted upon unquestioned by the executive and administrative departments of the government, is entitled to controlling weight in its interpretation.

People ex rel. Williams vs. Dayton, 55 N. Y., 367, 378.
Hassan vs. City of Rochester, 67 N. Y., 529, 535.

That a practical exposition of the Constitution long acquisced in will not be departed from, see.

1 Story on the Constitution (5th Ed. Bigelow), § 408, n. *(a)*, and cases cited.

In *Ogden vs. Saunders*, 12 Wheaton, 290, this Court said, per Mr. Justice JOHNSON:

> " When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition, deducible from well-known facts. Every candid mind will admit, that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption, that the contemporaries of the constitution have claims to our deference, on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people, when it was adopted by them."

This principle was applied by this Court in the case just cited in arriving at the conclusion that the power

of Congress to establish uniform laws on the supject of bankruptcy did not exclude the right of the States to legislate on the same subject, except when the power is actually exercised by Congress and when the State laws conflict with those of Congress.

VII.

The constitutional amendment of 1871, which the Supreme Court of Minnesota holds to be a "ratification" of the system of commuted taxation of railroads then in use, should more properly be described as a "recognition" rather than a "ratification" of that system.

If the framers of the amendment in question had considered the constitutionality of the legislation then existing as doubtful, and had desired to remove the doubt, they would have certainly used different language from that which they did use They would certainly have provided explicitly that any law theretofore or thereafter enacted providing that any railroad company should, in lieu of all other taxes and assessments, pay into the Treasury a percentage of gross earnings, should be deemed to be valid and constitutional, and that no such law theretofore passed or thereafter passed should be repealed or amended, except with the consent of a majority of the electors voting thereon. There is, however, no such language, nor anything approaching to it, in the amendment. There is nothing to suggest that anybody had ever had any doubt about the validity of the existing legislation. The language is purely negative. It assumes that the laws theretofore passed were properly passed and were existing laws, and it places a restriction upon their repeal or amendment.

No one reading this amendment for the first time would suspect that the laws theretofore passed were considered by anybody to be in conflict with the Constitution of the State and to be null and void. Indeed, to speak of the "repeal or amendment" of any law or laws theretofore enacted, if such law or laws were then void by reason of the constitutional inhibitions upon the powers of the Legislature, is to use language which amounts to a contradiction in terms. How can laws be repealed or amended if they do not exist, and how can they exist if they be unconstitutional *ab initio?*

We respectfully submit that this constitutional amendment is a declaration by the People of the State of Minnesota, in the nature of a construction of their own Constitution and in the nature of a declaration that all the existing legislation of that character was and had always been constitutional. In this sense it is a "ratification;" but, as we have already said, it is more properly a "recognition" or "declaratory affirmation" of the validity of existing legislation. It is thus a "ratification" or "recognition" or "affirmation" of the Statutes *in toto*, and not as declared by the Supreme Court of Minnesota in the case at bar, only partial and subject to the limitations of the right of the Legislature and of the voters to repeal or amend without the consent of the railroad companies.

WM. B. HORNBLOWER,
Of Counsel for Plaintiff in Error.